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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-946

PATRICK MUSTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals affirming the judgment of conviction (Pet. App. A) was entered without opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1972. The petition for a writ of certiorari was filed on January 2, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence at trial showed that money had been taken from the victims as a result of fear or threats induced by the co-conspirators.

2. Whether the acquittal by the jury of one of the codefendants precluded a guilty verdict with respect to petitioner.

3. Whether the trial court properly declined to admit into evidence an F.B.I. report on the ground that petitioner had failed to lay an adequate foundation for it.

4. Whether the trial court erred in admitting testimony concerning conversations and transactions between petitioner and another individual, who was allegedly involved in the conspiracy but was not named as a co-conspirator in the indictment.

5. Whether the identification testimony of a witness who was a victim of the alleged extortion scheme was properly admitted.

6. Whether the trial court abused its discretion in limiting the time of summation by petitioner's counsel to one hour.

7. Whether certain remarks by the prosecutor during summation were unduly prejudicial to petitioner.

8. Whether petitioner's sentence of two and a half years' imprisonment was cruel and unusual punishment.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of conspiring to extort and on eight substantive counts of extortion, in violation of the

Hobbs Act, 18 U.S.C. 1951. He was sentenced to two and one-half years' imprisonment on the conspiracy count, and, in addition, to a total of two years' probation on the other counts; he was also fined $20,000. The court of appeals affirmed without opinion (Pet. App. A).

The evidence at trial showed that petitioner, President of the Union County Board of Education for 20 years prior to 1972, and other members of the Board used their positions to impose a system whereby businessmen could do business with the Board only if they paid kickbacks. The testimony of three unindicted conspirators—Savarine, Fenton, and Castorino—disclosed that a group of businessmen, whom the conspirators referred to as "the club", kicked back approximately ten per cent of the money they received from their sales to the Board; the funds so collected were distributed to the Board members and its architect. Representatives of thirteen firms that did business with the Board further testified that they paid the kickbacks because payment was a requirement of doing business. One of the witnesses characterized the system of official corruption as being so pervasive that it was "a way of life" (VI Tr. 1186).

ARGUMENT

1. Petitioner contends that the evidence at trial failed to show that the money was taken as a result of fear or threats induced by the alleged conspirators. But some of the representatives of firms making the payments testified that the kickbacks were understood as

prerequisites for doing business with the Board (IV Tr. 684, 747, 759; V Tr. 875-884, 954-956, 1019-1022; VI Tr. 1096-1098; VII Tr. 1358-1359, 1439); others stated they had been told to make the kickbacks if they wished to make sales to the Board (V Tr. 911-917, 1069; VI Tr. 1103-1105, 1174, 1262, 1290-1293, 1312-1315). Payments made as a result of fear of financial loss are precisely what Congress intended to reach under the extortion provision of the Hobbs Act. See, *e.g.*, *United States* v. *Iozzi*, 420 F.2d 512 (C.A. 4), certiorari denied, 402 U.S. 943; *United States* v. *Tropiano*, 418 F.2d 1069 (C.A. 2), certiorari denied, 397 U.S. 1021; *United States* v. *Kramer*, 355 F.2d 891 (C.A. 7), reversed on other grounds, 384 U.S. 100. Contrary to petitioner's claim, the fact that in some instances the fear of economic loss was traced to the conspirators' course of conduct over several years, rather than to a specific threat made at a particular time, does not remove from the statutory prohibition the exploitation of that fear to collect kickback payments. *Callanan* v. *United States*, 223 F.2d 171 (C.A. 8), certiorari denied, 350 U.S. 862.

2. Petitioner next seeks to overturn his conviction on the ground that the jury verdict of guilty as to him was inconsistent with the acquittal of codefendant Powers, who, the witness Castorino testified, had collected kickback payments and then divided the money among Powers, Castorino, and petitioner. There is, however, no requirement that a jury return consistent verdicts. *Dunn* v. *United States*, 284 U.S. 390. On this record, the jury might well have believed Castorino's testimony as to petitioner but not found it credible as

to Powers; it might also have based its guilty verdict on testimony of other witnesses who connected petitioner to the conspiracy. The fact that the jury concluded there was insufficient evidence to connect co-defendant Powers to the conspiracy is not a reason to disregard the evidence showing petitioner's participation in the extortion scheme.

3. Petitioner contends that the district court erred in refusing to permit him to introduce a report of an F.B.I. interview with unindicted co-conspirator Fenton because a proper foundation had not been laid for its admission. According to the report of the interview, Fenton then stated that, after the death of the Board member in charge of maintenance, he was told by Savarine or Castorino to deliver kickbacks to Castorino (Pet. App. E); in his trial testimony Fenton denied he had made the statement (IV Tr. 654-655). It was, however, only after both sides had rested that petitioner sought to introduce the report (X Tr. 3044). Petitioner also failed to make an effort to comply with the requirement that he establish a foundation for admissibility through the testimony of the agents who had conducted the interview, all of whom were present at trial. The court's ruling, therefore, properly conformed to the evidentiary rule requiring that a foundation must be laid for the admissibility of such documents. While petitioner asserts that there was no need to establish a foundation since the statement was delivered pursuant to 18 U.S.C. 3500 (the Jencks Act), the Jencks Act did not purport to affect the rules of evidence regarding the admissibility and use of statements produced pur-

suant thereto. *United States* v. *Knox Coal Company*, 347 F.2d 33 (C.A. 3), certiorari denied *sub nom. Lippi* v. *United States*, 382 U.S. 904.[1]

4. Relying on *Stirone* v. *United States*, 361 U.S. 212, petitioner argues that testimony connecting him with O'Malley, who allegedly collected money in furtherance of the conspiracy, should not have been admitted because O'Malley was not named in the indictment as one of the five conspirators. He claims that the admission of this testimony constituted an impermissible broadening of the indictment. But the indictment in this case charged a conspiracy to extort kickback payments; the testimonial references to O'Malley did not alter the character or nature of that alleged conspiracy. Unlike *Stirone*, the proof at trial did not pertain to a crime different from that charged in the indictment. The testimony about others who participated in the same extortion scheme but were not named as co-conspirators related to the same conspiracy as the one charged.

5. Petitioner also challenges the court's refusal to strike the testimony of one Raymond Tobler, who claimed he was a victim of the Board's extortion. Tob-

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[1] The quotation cited by petitioner from *United States* v. *Borelli*, 336 F.2d 376 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960, is not in point. In *Borelli* the court held that, rather than forcing the defendant to rely solely upon the witness' admission that he had made a prior inconsistent statement, the complete prior inconsistent statement should have been admitted upon the defendant's motion. There is no indication in that case, however, that there was no foundation for the statement. Indeed, *Borelli* specifically stated that when a witness is confronted with and denies what appears to be an inconsistent statement, counsel's only recourse is then to call the agent who took the statement and endeavor to prove the contrary.

ler stated on direct examination that he had paid kickbacks beginning in about 1960, when someone, whom he believed to be petitioner, had told him that future sales were to be made through the Board of Education rather than directly to the county high schools, and that it would be necessary to pay a kickback of ten per cent on all such purchases made by the Board (VI Tr. 1260-1263). He also testified that he had periodically paid kickbacks until 1968, when he ceased to do business with the Board (VI Tr. 1263-1266, 1269). On cross-examination Tobler repeated that he could not "certify" that the person with whom he spoke was petitioner (VI Tr. 1292).

Petitioner argues that Tobler's testimony should not have been admitted because it concerned events commencing prior to the conspiracy charged in the indictment, and because it was not a positive identification. But the trial court was careful to instruct the jury that Tobler's testimony was only relevant to the conspiracy charged (VI Tr. 1258). Moreover, to the extent that the testimony indicated payments were made prior to commencement of the conspiracy charged, it was relevant to the question of intent and demonstrated a course of conduct that had contributed to a fear of economic loss among those in the community who sought to do business with the Board. Accordingly, it was properly admitted. See, *e.g.*, *United States* v. *Stirone*, 262 F.2d 571 (C.A. 3), reversed on other grounds, 361 U.S. 212; *United States* v. *Jones*, 425 F.2d 1048 (C.A. 9), certiorari denied, 400 U.S. 823. Nor does the fact that Tobler could not make a positive identification of

petitioner provide a basis for excluding his testimony indicating that he believed petitioner was the person with whom he spoke. As the judge correctly ruled (VI Tr. 1311), the identification testimony was a matter to be weighed by the jury. Moreover, in light of the testimony of Fenton and Castorino, who clearly connected petitioner with the conspiracy, petitioner's claim of prejudice as a result of Tobler's identification is not well taken.

6. Petitioner objects to the court's one-hour limitation of the summation to the jury by his counsel.[3] A court, however, has wide discretion in limiting the time for argument to the jury. *United States* v. *Roviaro*, 379 F.2d 911 (C.A. 7); *Barnard* v. *United States*, 342 F.2d 309 (C.A. 9), certiorari denied, 382 U.S. 948; *Hodge* v. *United States*, 271 F.2d 52 (C.A. 5), certiorari denied, 361 U.S. 961; *United States* v. *Kay*, 101 F.2d 270 (C.A. 2), certiorari denied, 306 U.S. 660. And a limitation granting each defendant in a multi-defendant case one hour to summarize is clearly a reasonable exercise of discretion. See *United States* v. *Gleeson*, 411 F.2d 1091 (C.A. 10), restricting several defendants to one hour jointly for closing arguments.

7. Petitioner also challenges the prosecutor's reference in closing argument to widespread corruption that the Board had engendered in the county. He complains particularly about the reference to petitioner's son, Mayor Musto, who appointed some of the members to the Board, and the characterization of him as the mastermind of the extortion scheme. But these re-

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[3] The government was granted one hour and forty five minutes; each of the three defendants was granted one hour (XI Tr. 3319).

marks by the prosecutor were proper comments on the evidence introduced at trial (III Tr. 267; VII Tr. 1759).[3]

8. Finally, petitioner contends that his sentence of two and one-half years' imprisonment amounts to cruel and unusual punishment, since he is 79 years old. But petitioner's sentence was well within the maximum twenty years' imprisonment provided for in 18 U.S.C. 1951; nor was his fine of $20,000 excessive, since the statute would have permitted a fine of $10,000 on each of the nine counts for which he was convicted. The fixing of the maximum penalties for criminal acts is a legislative function, and the judicial decision setting the actual prison sentence within those statutory limits cannot be considered cruel and unusual punishment. See *United States* v. *Lloyd,* 431 F.2d 160 (C.A. 9), certiorari denied, 403 U.S. 911; *United States* v. *Tobin,* 429 F.2d 1261 (C.A. 8); *Andrus* v. *Turner,* 421 F.2d 290 (C.A. 10); *United States* v. *King,* 420 F.2d 946 (C.A. 4), certiorari denied, 397 U.S. 1017. This rule applies regardless of the age of the person upon whom the sentence is imposed, since that is simply one of the factors the district judge was called upon to weigh in exercis-

[3] Petitioner also asserts that he was prejudiced by the statement by co-defendant Powers' attorney at the beginning of his summation to the effect that he (the attorney) was "reminded of a person in times past who came to this earth to try to make the world a better place to live in [and] who ended up being hung between two thieves" (XI Tr. 3410). But when that quotation is read in context, it is clear that counsel was referring to Castorino and Savarine, the two government witnesses, and not to petitioner. The other statements of Powers' counsel to the effect that Powers was not guilty and that his presence on the Board was "a breath of life" were obviously also not directed against petitioner and in no way prejudiced him (Pet. App. I).

ing his discretion. *Black* v. *United States,* 269 F.2d 38 (C.A. 9), certiorari denied, 361 U.S. 938.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[4]

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FEBRUARY 1973.

[4] This case does not raise any issues under the Hobbs Act that relate to the issue presently pending before the Court in *United States* v. *Enmons,* No. 71-1193 (the application of the Hobbs Act to violent tactics in a labor-management dispute), and there is thus no need to defer action on the petition pending a decision in *Enmons.*

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